INDEX TO AUTHORITIES CITED.

IN THE

SUPREME COURT OF THE UNITED STATES

OCTOBER TERM, A. D. 1943

No. 226

POLISH NATIONAL ALLIANCE OF THE UNITED STATES OF NORTH AMERICA, A CORPORATION,
Petitioner,

vs.

NATIONAL LABOR RELATIONS BOARD,
Respondent.

ON WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT.

REPLY BRIEF OF PETITIONER.

The question whether insurance is commerce or not is not now open to discussion as though it were a matter of first impression. The conditions under which *Paul* v. *Virginia* was decided, and the meaning of the word "commerce" in the late eighteenth century, and its meaning in modern dictionaries, have little relevance to the question before the Court.

Nor is the problem one of finding an analogy between an insurance policy crossing state lines through the means of interstate communication or transportation and the use of the same facilities by banks, press associations, sellers of lottery tickets, or, in the transportation of females for immoral purposes.

The question is one of construing the words "commerce" and "affecting commerce" in an Act,—the National Labor

Relations Act—which became law at a time when insurance had been declared not to be commerce for about seventy years before its enactment. The problem arises when it is sought to apply the provisions of this Act to a fraternal benefit society upon the theory that the society is in the insurance business, that insurance is commerce, and that therefore petitioner, the society in question, is engaged in commerce and its operations affect commerce.

The importance of *New York Life Insurance Co.* v. *Deer Lodge County,* 231 U. S. 495, lies in the fact that forty years or more after *Paul* v. *Virginia,* under conditions similar to the present, this Court reaffirmed the doctrine that insurance is not commerce. It is no answer to *Deer Lodge County,* to compare the conditions in 1868, or commerce in the late eighteenth century, with present day conditions and modern commerce, and ignore the fact that for seventy-five years insurance has been declared not to be commerce.

The contentions of the Government, and of the Board in this case were raised in *Deer Lodge County* and fairly met. The insurance company in that case proudly declared that it did business "in all the States of the United States and with persons residing in every country of the civilized world." The Court took particular notice of this contention and of the contention that is being urged today by the Government and the Board. "It was also urged," says the Court, "that modern life insurance had taken on essentially a national and international character, and that when *Paul* v. *Virginia* was decided, the business was to a great extent local; that is, conducted through the domestic stock companies. The great and commanding organizations of the present day had hardly begun the amazing development which has made them the greatest associations of administrative trusts in the business world."

There is no such change in the "climate of opinion" or in the relative position of insurance in the economic life of the United States as would warrant this Court in over-

ruling *New York Life Insurance Co.* v. *Deer Lodge County* and its long line of predecessors, with all the consequences such action will entail, in the absence of action by Congress directly challenging the doctrine that insurance is not commerce, and explicitly declaring that there shall be federal regulation of insurance by virtue of the power granted to Congress by the Commerce Clause.

Directly to the point is *Western Live Stock* v. *Bureau of Revenue,* 303 U. S. 250, wherein it is said, (citing *Paul* v. *Virginia*) "That the mere formation of a contract between persons in different States is not within the protection of the Commerce Clause, at least in the absence of Congressional action, unless the performance is within its protection, is a proposition no longer open to question." This case is not explained away by confining its doctrine to the mere issuance of an insurance policy and to no other transaction in connection therewith. It must be assumed that the contracts in question which were held, under the authority of *Paul* v. *Virginia* and its successors not to be commerce, were entered into for a monetary consideration, and that money was paid under them through the mails, and correspondence relating to them passed back and forth over state lines.

The Board contends that an insurance policy is itself an article of commerce as much as a lottery ticket or a correspondence course in learning. *Champion* v. *Ames,* 188 U. S. 321, and *International Text Book* v. *Pigg,* 217 U. S. 91, were both decided before *New York Life Ins. Co.* v. *Deer Lodge County,* and did not affect the decision of the Court in that case.

The effect of *Deer Lodge County* and its predecessors is said to be weakened by *Thames & Mersey* v. *U. S.,* 237 U. S. 19, but this language of the Court appears on page 25 of that case:

> "Nor have we to do in the present case with the taxation of the insurance business as such, or with the

power of the State to fix the conditions upon which foreign corporations may transact business within its borders (citing *Paul* v. *Virginia*, *Hooper* v. *California*, *New York Life Ins. Co.* v. *Deer Lodge County* and others). Let it be assumed as this Court has said that the insurance business generally considered is not commerce; that the contract of insurance is a personal contract,—an indemnity against the happening of a contingent event. The question still remains whether policies of insurance against marine risks during the voyage to foreign ports are not so vitally connected with exporting that the tax on such policies is essentially a tax upon exportation itself. The answer must be found in the actual course of trade. Such taxation does not deal with preliminaries or with definite and separate subjects: the tax falls upon the exporting process."

The *Deer Lodge* case is also said to have been weakened by *Securities and Exchange Commission* v. *Joiner Leasing Corp.*, No. 24, this term. The Board say (Board Brief, pp. 35, 36):

"The sales, held by the Court to be in commerce, were in effect sales of real estate coupled with an economic inducement to share in the fruits of a speculative venture. Certainly a sale of a specific interest in real estate is 'personal' and as the Court observed in the *Deer Lodge* case: 'certainly nothing can be more immobile.'"

But this Court declared in the *Joiner* case:

"Defendants were not as a practical matter offering naked leasehold rights . . . Their proposition was to sell documents which offered purchaser a chance, without undue delay or additional cost, of sharing in discovery values which might follow a current exploration enterprise . . . An agreement to drill formed the con-

sideration upon which Anthony was able to collect leases on 4750 acres . . . undertaking to drill enabled Jones to finance by selling acreage.

Acceptance of the offer made a contract on which payments were timed and contingent upon completion of the well and therefore a form of investment contract in which investor paid both for a lease and for a development project . . . The trading in these had all the evils inherent in security transactions which it was the aim of the Securities Act to end."

It was said by Sigmund Timberg in his article on page 995 of 50 Yale Law Journal, cited in a footnote to page 47 of the Board's brief:

"It must be conceded that, so far as the Courts have spoken, no type of insurance contract is a security for purposes of the State Blue Sky Laws, nor is it likely that any type of policy will be regarded as a security for purposes of the Securities Act of 1933. Insurance contracts do not come under the jurisdiction of State Security Commissions or of the S.E.C."

Timberg states further (p. 995, note) that the final House Report on S.E.C. legislation declared that insurance policies were not to be regarded as securities.

The Government and the Board seek an analogy between the present cases and the hospital cases of *Jordon* v. *Tashiro*, 278 U. S. 123, and *American Medical Assn.* v. *U. S.*, 317 U. S. 519. Such an analogy, if it exists, is not sufficient to overturn the declared doctrine that insurance is not commerce, which has stood unmodified for seventy-five years.

This Court in the *Tashiro* case, was careful to declare that it was giving a liberal interpretation to Treaty provisions, in accordance with established rules of construction.

The Court say:

> "The terms 'commerce,' 'commercial' and 'trade' . . . may connote . . . other occupations and other recognized forms of business enterprise which does not necessarily involve trading in merchandise . : .
>
> "The words 'commercial purposes' (in the Treaty) include the operation of a hospital as a business undertaking."

The question decided in *American Medical Association* v. *U. S.*, 317 U. S. 519, was not whether the activities of Group Health, a non-profit organization, were commerce, but whether Group Health was engaged in trade within the meaning of Section 3 of the Sherman Act.

Congress in the past seventy-five years has not challenged the doctrine of *Paul* v. *Virginia*. In this silence, and under the shadow of repeated decisions of this Court that insurance is not commerce, a universal and complex system of State regulation of insurance companies has come into being. This situation Congress has not seen fit to disturb.

In the report of the Temporary National Economic Committee, p. 41 (77th Congress, 1st Sess. Doc. 35) the Committee, although it had had presented to it the contention that the cases of *Paul* v. *Virginia* and its successors were "a most unfortunate and erroneous series of Court decisions," and although it found life insurance (legal reserve—not fraternal—Mono. #28, T.N.E.C., p. 1) to be one of the largest businesses in the United States, prefaced its recommendations with the words:

> "Life insurance business is regulated by the States. Our studies have disclosed conditions which lead to the following recommendations which are respectfully made for the consideration of the several States in which these companies are domiciled."

The only places suggested in the Report for federal action had nothing to do with regulation of the lawful

business of insurance companies or of insurance itself, but looked toward the prevention of unlawful use of the mails, radio, etc., by unlicensed out-of-State companies; and the extension of the Bankruptcy Act to insurance company reorganizations and liquidations.

That the supporters of the National Labor Relations Act in its passage through Congress were content to accept this Court's definitions of Commerce as they then existed, is further shown by the statement of Congressman Marcantonio, (79 Cong. Rec., Part 9, page 9698): who having read Subsection 6 of Section 2:

> "(6) The term 'commerce' means trade, traffic, or commerce or any transportation or communication relating thereto among the several states," etc., proceeded:
>
> "I respectfully submit that this language does not in any manner conflict with the definition of 'interstate' as defined in the decision in the *Schechter* case. There is not a single word in this language which conflicts with the definition of 'interstate' as we find it in the Constitution or in any of the States."

The Congressman then read Sec. 7:

> "The term 'affecting commerce' means in commerce, or burdening or affecting commerce, or obstructing the free flow of commerce," etc.,

and continued:

> "If this particular definition is to be interpreted by a board to be created under this bill, so as to violate the interstate definition as handed down in the decision in the *Schechter* case, the Supreme Court will declare it unconstitutional . . . What we are trying to do here is to attempt to guarantee certain rights to labor in language which is constitutional, and if tomorrow the application of this statute in certain cases may be unconstitutional, at the same time we would preserve those rights in cases where the application of the statute would be deemed to be constitutional."

There is no discussion in the Board's brief of any of the cases cited by petitioner upon the proposition that a fraternal benefit society is not an insurance company. This phase of the case is passed off with the declaration that the fraternal activities of petitioner are mere adjuncts to its insurance business. The undisputed fact that petitioner is chartered as a non-profit corporation by the State of Illinois, and by the law of that State is declared to be a charitable and benevolent institution, and its funds are by law exempt from all taxation other than taxes on its real estate and office equipment, is dismissed with the statement that "the Illinois Law is immaterial" (Bd. bf. 74).

The charitable and benevolent nature of petitioner is not alone shown by its expenditures in charity and benevolence, substantial as these are, but this is the very nature given to it by the charter and the laws of Illinois, the State of its creation. It can make no profit from its transactions, and it must always preserve its representative form of government, and restrict its membership to selected persons of a particular national descent and their wives. Its members are bound by a ritual, and hold the common purpose announced in the preamble to the Constitution of the Polish National Alliance. It is not an insurance company and it is not engaged in commerce. . . .

Respectfully submitted,

CASIMIR E. MIDOWICZ,
Attorney for Petitioner, Polish National Alliance of the United States of North America.

Of Counsel.
EWART HARRIS.

BRIEF FOR THE RESPONDENT IN OPPOSITION

INDEX

AUTHORITIES CITED

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No. 226

POLISH NATIONAL ALLIANCE OF THE UNITED STATES OF NORTH AMERICA, PETITIONER

v.

NATIONAL LABOR RELATIONS BOARD

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES CIRCUIT COURT OF APPEALS FOR THE SEVENTH CIRCUIT

BRIEF FOR THE NATIONAL LABOR RELATIONS BOARD IN OPPOSITION

OPINIONS BELOW

The opinion of the court below (R. 605–617) is not yet reported. The findings of fact, conclusions of law, and order of the National Labor Relations Board (R. 539–575) are reported in 42 N. L. R. B. 1375.

JURISDICTION

The decree of the court below was entered on June 22, 1943 (R. 621–624). The petition for a writ of certiorari was filed on August 4, 1943.

The jurisdiction of this Court is invoked under Section 240 (a) of the Judicial Code, as amended by the Act of February 13, 1925, and under Section 10 (e) and (f) of the National Labor Relations Act.

QUESTIONS PRESENTED

1. Whether the unfair labor practices of an employer engaged in the life insurance business affect commerce within the meaning of the Act.

2. Whether the nonprofit character of a fraternal benefit association which engages in a nation-wide life insurance business exempts its unfair labor practices from the application of the Act.

3. Whether, in the circumstances of this case, the Board's determination of the unit appropriate for the purposes of collective bargaining constituted a proper exercise of the Board's discretion.

4. Whether there is substantial evidence to support the findings of the Board, which were sustained by the court below, that petitioner discriminated against 28 employes in violation of Section 8 (1) and (3) of the Act and that its unfair labor practices caused and prolonged a strike of its employees.

STATUTE INVOLVED

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1935, c. 372, 49

Stat. 449, 29 U. S. C., Sec. 151, *et seq.*) are set forth in the Appendix, *infra*, pp. 24–26.

STATEMENT

After appropriate proceedings, the Board, on August 11, 1942, issued its findings of fact, conclusions of law, and order (R. 539–575). The facts as found by the Board and shown by the evidence may be summarized as follows:[1]

1. NATURE OF PETITIONER'S OPERATIONS

The findings with respect to petitioner's operations are based on uncontradicted evidence. Petitioner, a fraternal benefit society composed of persons of Polish descent, is organized under the laws of the State of Illinois as a nonprofit corporation, with its main office in Chicago, Illinois (R. 541; 443). It is licensed to do business in 26 states, the District of Columbia, and the Province of Manitoba, Canada (R. 541; 385, 443). Petitioner's membership[2] is distributed among 1,817 membership lodges which are grouped into 190 councils, 160 of which are located outside the State of Illinois (R. 541; 15, 206, 384–385, 443).

[1] In the following statement the references preceding the semicolons are to Board findings and the succeeding references are to supporting evidence.

[2] Petitioner's members are insurance benefit certificate holders; in 1938 it abolished its "social membership," *i. e.*, its uninsured membership, and has since afforded only "beneficial membership," *i. e.*, certificate holding status (R. 9–10, 205, 328).

On December 31, 1941, petitioner had in force 272,897 insurance benefit certificates with a total face value of $160,000,000, distributed among more than half of the states of the United States and Manitoba (R. 541; 444, 447). These insurance certificates provide for the payment of benefits in the case of death, disability and accident (R. 541; 443).[3]

Premiums collected in excess of benefits paid out are invested. On December 31, 1941, petitioner's portfolio of investments, totaling more than 30 million dollars, was composed of a variety of properties and securities: investments in railroads amounted to more than 1½ million dollars; bonds in public utilities and large-scale industries operating in all sections of the country amounted to about 3 million dollars; extensive real estate holdings in 5 states were valued at 11 million dollars; and securities of the United States, of state governments, and of various political sub-

[3] Petitioner sells every form of protection normally furnished by standard life insurance companies, including (1) ordinary life, (2) 20-year payment life, (3) 20-year endowment, (4) endowment at age of 65, and (5) combination term and paid up at age of 65 (R. 388). The provisions contained in petitioner's insurance contracts parallel those of the standard insurance policies (R. 394–402); its "ordinary life" policy, for example, provides for the payment of premiums, change of beneficiary, settlement options, automatic extended and paid-up insurance, premium and cash loans, and cash surrender values (R. 403). Premium rates are based on standard mortality tables (R. 388). Net earnings are distributed as dividends to certificate holders (R. 392–393).

divisions totaled more than 8 million dollars (R. 541–542; 384–385, 444). In 1941 its total income was $5,717,344, of which $3,723,364 was received from certificate holders and $1,690,250 from investments (R. 542; 384). During the same period, benefits paid to certificate holders totaled $1,845,126, and loans to certificate holders amounted to almost 1½ million dollars (R. 542; 384).

Petitioner's entire operations are directed by its officers and directors from its home office in Chicago, where all terms and conditions of the benefit certificates are determined, investments made, applications for certificates, claims, and loans received and acted upon, and all benefit certificates and checks issued and mailed (R. 542; 7–8, 11–12, 105–106, 204–205, 230–231, 237, 377–380, 444).

Petitioner, as an essential part of its operations, engages the services of the Retail Credit Co. of Atlanta, Georgia, to whom all applications for insurance certificates are mailed from Chicago and which company, in turn, investigates all applicants and mails credit reports from that company's branch offices throughout the country to petitioner's Chicago office (R. 543; 12–13). Substandard risks are reinsured through the Lincoln National Life Insurance Company of Fort Wayne, Indiana, thus necessitating the mailing of reinsurance documents to the Lincoln's offices at Fort Wayne (R. 543; 9, 10–11). At the time of the hearing,

more than $250,000 of petitioner's risks were thus reinsured (R. 543; 11).

The administrative costs of handling these interstate transactions involve substantial sums of money. In 1941, $169,000 was disbursed for commissions and fees of field agents, $20,000 for payment of "managers" engaged in selling insurance certificates, over $17,000 for field supervision and travel expenses of officials, $13,000 for medical examinations, $4,000 for credit investigations of applicants, and $19,000 for postage, express, telegraph, and telephone service (R. 543; 13, 446, 448). In addition, petitioner disbursed over $10,000 for advertising in newspapers, magazines, radio and other media, and $1,340 for printing, all outside the State of Illinois (R. 543; 448). Further, petitioner achieves nation-wide publicity by publishing and selling an official almanac throughout the United States, and by distributing an official publication, the *Zgoda*, of which, during 1941, it mailed over 1,000,000 copies of the daily edition, and 5,000,000 copies of the Sunday edition to persons outside the State of Illinois (R. 543; 14, 446).[4]

Upon the basis of the above facts the Board found that petitioner's unfair labor practices were in commerce and affected commerce within the meaning of the Act (R. 544).

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[4] The *Zgoda* is published by petitioner's wholly owned subsidiary, Alliance Printers and Publishers, Inc., an Illinois corporation (R. 543; 445).

2. UNFAIR LABOR PRACTICES

In March 1941 the Office Employees' Union, No. 20732, A. F. of L., hereinafter called the Union, began an organizational campaign among petitioner's office employees, and, by March 26, the Union included within its membership a majority of petitioner's employees in an appropriate unit (R. 548–549; 23–28, 91–92, 98–102, 119–123, 143, 154–157, 159–160, 275–277, 410–411).[5] Confronted with the successful unionization of its employees, petitioner's directors and executives set out to undermine the Union. Petitioner warned its employees that they were "foolish to get involved in [that] kind of a trouble, * * * there [was] no place for a union in any organization like Polish National Alliance" (R. 551, 552, 554; 38, 39, 131, 171, 182–183); interrogated

[5] The Board found (R. 545–548) that all office employees of petitioner's Chicago office, excluding janitors, attorneys, elected officers, the chief clerk of the auditing department, the manager of the real estate department, the inspector of the rent collection department, rent collectors, the chief organizer of the organization department, the personal secretary to the president, the personal secretary to the general secretary, the confidential secretary to the censor (employed at Milwaukee, Wisconsin), the assistant secretary (administrative) to the general secretary, the assistant secretary (administrative) to the treasurer, and librarians, constitute a unit appropriate for collective bargaining purposes. Under the Argument (pp. 18–21, *infra*) we show that the Board's finding upon the unit question was not arbitrary, and that the court below properly sustained it.

them respecting their Union membership and activity (R. 551, 552; 75, 82, 108, 126, 130–131); offered wage increases to Andrzejewski, the Union Chairman, provided that he "dropped all union activities and induced the other employees to do likewise" (R. 551, 555; 36–37). Finally, on October 6, 1941, petitioner climaxed its antiunion campaign by discharging Anna Owsiak, an employee of outstanding ability and an open advocate of the Union (R. 556–558).

Prior to her joining the Union, Owsiak had frequently been complimented by petitioner's supervisory officials for the excellence of her work (R. 556; 133) and, on June 15, 1941, petitioner gave tangible evidence of its high regard for her by increasing her salary (R. 556; 133).[6] Her membership in the Union, which she joined on June 20, 1941 (R. 556; 120, 132), was known to petitioner. On August 25, 1941, when her supervisor inquired of her whether she had joined the Union, she candidly replied that she had (R. 557; 131–132). He then queried whether she thought it fair to her employer to join a union (R. 557; 132–133). Two weeks later Owsiak suffered an appendicitis attack and took a leave of absence (R. 557; 135, 139). On October 4, upon her return to petitioner's office, she was discharged, with the statement that

[6] There is also undisputed evidence that in July 1941, Owsiak was transferred to the real estate department because petitioner "needed someone who was efficient to help them catch up with the work" (R. 128, 134).

petitioner had determined to "let her go" because of a lack of work (R. 557; 66, 135–136). Petitioner, however, abandoned this ground for the dismissal when it talked to Union representatives later that day (R. 557–558; 136–137, 138, 266, 267). It then urged her absences and tardiness as the basis for her discharge (*ibid.*). The specious nature of the latter excuse,[7] which petitioner still advances for Owsiak's discharge (Pet. 45), lends weight to the Board's conclusion that the real reason for her discharge was her Union affiliation (R. 558). The Board found that Owsiak's membership in and support of the Union constituted the sole ground for her discharge (R. 558).

Despite petitioner's open antagonism, the Union, from March 26, 1941, to October 6, 1941, sought to bargain with petitioner, but to no avail (R. 549–550; 69, 200–201, 238, 426–427, 427–428). Petitioner, claiming that the Act did not apply to its activities, admittedly refused to bargain (R. 549–550; 309, 323, 427–428). On September 26, after the Union had announced its intention to strike, petitioner assured the Union that if the contemplated strike action were postponed until after the December 10 meeting of petitioner's Supervisory Council, employment relations would, in the meantime, be stabilized (R. 550; 63–64). Less

[7] Owsiak had never been criticized in this respect (R. 558; 138). As a matter of fact, all of her previous absences occurred before August 1941, most of them because of illness, and had been excused by petitioner (R. 558; 138–140).

than 2 weeks after this pronouncement, petitioner discriminatorily discharged Union member Anna Owsiak (see pp. 8–9, *supra*). The same afternoon the Union accused petitioner of violating the previously arranged truce by its discriminatory activities, thereby releasing the Union from its no-strike pledge (R. 559; 63, 65–66). Petitioner agreed to notify Owsiak before the Union meeting scheduled that night that she was to be reinstated the following morning (R. 558; 66–67, 136–137, 241). This was not done (R. 558, 559; 67, 137). The same night a Union meeting was held and the membership apprised of the state of negotiations; after a general discussion centering upon petitioner's refusal to bargain, and its continuing campaign of coercion and intimidation, the Union voted to strike (R. 559; 40, 67). The strike began the next day (*ibid.*). The Board found that petitioner, "as a result of these unlawful acts and [its] unwavering course of anti-union conduct" caused the foregoing strike (R. 563).

Petitioner sought to break the strike by various steps calculated to "impress upon the striking employees the futility of remaining members of the Union and to evade its duty to bargain collectively" (R. 563–564). Thus, it persisted in its refusal to bargain with the Union (R. 563–564; 67, 68), continued to make disparaging comments about the Union to Union members (R. 559, 561, 563, 564; 77–78, 173–174, 193), and, by several de-

vices, including the publication in its official organ of false and misleading statements concerning the causes and status of the strike, urged the strikers to return to their jobs (R. 560, 561–562; 41–42, 417–419, 420–422, 446).

On January 27, 1942, after the discontinuance of the strike, and again on February 9 and 11, all 26 of the remaining[8] strikers unconditionally offered to return to work and applied for reinstatement (R. 565; 47–49, 423, 424–425). Petitioner admittedly ignored all of these communications (R. 565; 289) and, at the time of the hearing, none of the strikers had been reinstated (*ibid.*). The record plainly establishes that the work of the striking employees was being performed by employees transferred temporarily from other departments and by employees hired since the strike, both of which groups performed an unusual amount of overtime work (R. 565–566; 241–242, 263, 268, 289, 438, 439).

The Board concluded that, by these acts, petitioner had engaged in unfair labor practices within the meaning of Section 8 (1), (3), and (5)

[8] One Ziolkowski, although going out on strike on October 7 with the others, attempted to return to work on October 10 (R. 564; 113–114). Petitioner demanded that "if [he was] to start working again [he would] have to fill out [an] application" as a new employee (R. 564; 115). Ziolkowski refused to accept this condition and was refused reinstatement (*ibid.*). The Board found that petitioner attached the unfavorable condition to its offer of reinstatement in order to punish Ziolkowski for having joined the Union and the strikers (R. 564–565).

of the Act (R. 556, 558, 563, 564, 565, 567), and ordered petitioner to cease and desist from these unfair labor practices; to bargain collectively with the Union; to reinstate Owsiak with back pay; to offer reinstatement to the 27 employees who went out on strike on October 7, 1941, including Ziolkowski, with back pay from January 27, 1942, the date of the discrimination against them; and to post appropriate notices (R. 572–574).

On August 21, 1942, the petitioner filed in the court below a petition to review the Board's order (R. 578–586). On June 5, 1943, the court handed down its decision and entered its decree enforcing the Board's order with minor modifications not here in issue (R. 605–624).

ARGUMENT

The only issue of general importance presented by the petition is the question whether the unfair labor practices of an employer engaged in the life insurance business affect commerce within the meaning of the Act. We believe that the decision below on this issue is clearly right, and in harmony with, rather than opposed to, the applicable decisions of this Court. Moreover, it presents no conflict with decisions of other circuit courts of appeals. We may point out, however, that a district court has recently held the business of fire insurance not to be within the scope of the Sherman Act, deeming itself bound by language in

opinions of this Court, which we regard as inapposite, that insurance is not commerce. *United States* v. *Southeastern Underwriters,* decided August 5, 1943 (N. D. Ga.), appeal to this Court allowed August 30, 1943. That case, of course, relates to business practices, not unfair labor practices, and in our judgment rests on a misapprehension of the decisions of this Court; its pendency would therefore not seem to call for further review of the case at bar.

1. APPLICABILITY OF THE ACT TO PETITIONER

The present case does not require a test of the present vitality of the statements found in *Paul* v. *Virginia,* 75 U. S. 168, and other cases cited by petitioner (Pet. 32–38) to the effect that insurance is not commerce. As the court below held (R. 612), "even though petitioner's contention that it is not directly engaged in interstate commerce be tenable, it would still be faced with an insurmountable barrier. As already noted, the power of the Board is not limited to commerce but includes 'affecting commerce.'" The widespread effect upon interstate commerce which would ensue on a cessation or restriction of petitioner's operations is patent upon the record. The operations of verification, acknowledgment, recording, and depositing, prime requisites to the orderly functioning of petitioner's business, would be rendered impossible. The regular movement of funds into the nation's investment markets would be halted at its

source in Chicago and numerous enterprises deprived of capital, for want of essential administrative machinery. Similarly, the handling of new applications with the care required to secure and maintain the risk structure would, of necessity, be dispensed with. Collections of premiums in the field would inevitably suffer because of the disruption of the regular clerical and supervisory procedures in the central office. The placement of industrial and commercial investments would in consequence be adversely affected not only because of the interruption to the operations by which lending activities are carried out, but because of the shutting off of new funds. Normal handling, management, liquidation, and redistribution of old investments would likewise be disrupted.

There is nothing about insurance companies which renders their unfair labor practices less disruptive of commerce than those of other employers to which the Act has been held to apply. The test of jurisdiction laid down in *National Labor Relations Board* v. *Jones & Laughlin Steel Corporation*, 301 U. S. 1, is satisfied in any case in which "stoppage of * * * operations by industrial strife" would result in substantial interruption to or interference with the free flow of interstate commerce (301 U. S. at 41). Where such interruption would occur, the Court pointed out, unfair labor practices on the part of employers, shown by long experience to be "prolific causes of strife,"

have a "close and intimate relation" to interstate commerce and are subject to federal regulation under this Act (301 U. S. at 42, 43).

Petitioner's activities affect commerce no less than the operations of a bank; unfair labor practices in that field have been held to be covered by the Act, and this Court has declined to review the holding. *National Labor Relations Board* v. *Bank of America*, 130 F. (2d) 624, 626 (C. C. A. 9), cert. denied, 318 U. S. 791. Compare also *Consolidated Edison Co.* v. *National Labor Relations Board*, 305 U. S. 197; *Wickard* v. *Filburn*, 317 U. S. 111.

Even if the coverage of the Act depended on a showing that petitioner is engaged in interstate commerce, such a showing is amply made in the present case, and the result is not inconsistent with what was actually decided in *Paul* v. *Virginia* and derivative precedents. Petitioner's business, the interstate sale of a variety of certificates of insurance, to a nation-wide segment of the population, constitutes a continuous course of dealing involving the interstate exchange of a commodity, although intangible, for money. The certificates of insurance entitle the holder to participation in the profits of the enterprise and various loan privileges,[9] thus constituting a special type of security, transactions in which are not beyond the reach of

[9] *Penn Mutual Co.* v. *Lederer*, 252 U. S. 523, 531–532; *Commissioner of Internal Revenue* v. *Illinois Life Insurance Co.*, 80 F. (2d) 280, 282 (C. C. A. 7).

the commerce power.[10] The certificates also provide for money payment upon death or the expiration of a fixed term; regulation of the seller of such a thing of value is clearly within the scope of the commerce clause.[11]

Moreover, as a regular feature of its business petitioner constantly and extensively uses the mails, telephones, and like instrumentalities of interstate commerce, and receives remittances, premiums, applications, correspondence, and documents through these media. The normal everyday dealings between petitioner and its widely scattered group of certificate holders thus consists of a two-way movement of communications, documents, and money, both necessarily employing the channels of interstate commerce. *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 128; cf. *International Text Book Co.* v. *Pigg*, 217 U. S. 91, 106–107.

With respect to *Paul* v. *Virginia*, and similar cases, the court below properly observed (R. 611) that "in each of [these cases] the court was considering the power of the state to tax or regulate, and not the power of Congress under the Commerce Clause. * * * The state's power to tax

[10] *Electric Bond & Share Co.* v. *Securities and Exchange Commission*, 303 U. S. 419, 433; *Champion* v. *Ames*, 188 U. S. 321, 352; *United States* v. *Ferger*, 250 U. S. 199, 204–205.

[11] *Associated Press* v. *National Labor Relations Board*, 301 U. S. 103, 128–129; *American Medical Association* v. *United States*, 317 U. S. 519.

or regulate is not the terminal boundary of federal power. 'It does not follow that because a thing is subject to state taxation it is also immune from federal regulation under the Commerce Clause' *Binderup* v. *Pathe Exchange*, 263 U. S. 291, 311.". See *Overstreet* v. *North Shore Corporation*, 318 U. S. 125. Moreover, *Paul* v. *Virginia* and the cases cited by petitioner have no application beyond the execution of the insurance policy, which in itself merely evidences an insurance transaction.[12]

It is of no consequence, finally, that petitioner is organized under the Illinois law relating to nonprofit organizations and operates for the sole benefit of its members. Petitioner does not undertake to differentiate its actual insurance operations from those of its nonfraternal competitors (Pet. 26–31; R. 544; 386–387). It is well settled that the mutual or nonprofit character of an enterprise does not remove otherwise commercial activities from the field of commerce. *Associated Press* v. *National Labor Relations Board*, 301

[12] As pointed out by this Court in its discussion of the conduct of the business of insurance in *Hoopeston Canning Co.* v. *Cullen*, 318 U. S. 313, at 317:

"The actual physical signing of contracts may be only one element in a broad range of business activities. Business may be done in a state although those doing the business are scrupulously careful to see that not a single contract is ever signed within the state's boundaries. Important as the execution of written contracts may be, it is ordinarily but an intermediate step serving to tie up prior business negotiations with future consequences which themselves are the real object of the business transaction."

U. S. 103, 128–129; cf. *American Medical Association* v. *United States*, 317 U. S. 519.[13]

2. APPROPRIATENESS OF THE UNIT

Petitioner's contention (Pet. 42–45) that the Board wrongfully included within the unit five "chief clerks" is without merit.

It is established that the Board's determination of the bargaining unit, "peculiarly a matter of administrative discretion" (*International Association of Machinists* v. *National Labor Relations Board*, 110 F. (2d) 29, 46 (App. D. C.), aff'd 311 U. S. 72, 729) and requiring application of specialized experience and expert knowledge concerning the process of collective bargaining, is conclusive unless arbitrary. *Pittsburgh Plate Glass Co.* v. *National Labor Relations Board*, 313 U. S. 146, 152–154.

The Board's decision in this case fully accords with its general policy of including in the unit those employees who "have a mutual interest in the objects of collective bargaining" (*Third An-*

[13] The only other circuit courts of appeals which have considered orders of the Board issued against employers who operated under a nonprofit form of organization have enforced them without question. *National Labor Relations Board* v. *Christian Board of Publication*, 113 F. (2d) 678 (C. C. A. 8); *North Whittier Heights Citrus Ass'n* v. *National Labor Relations Board*, 109 F. (2d) 76 (C. C. A. 9), cert. denied, 310 U. S. 632, 311 U. S. 724; *National Labor Relations Board* v. *Grower-Shipper Vegetable Ass'n*, 122 F. (2d) 368 (C. C. A. 9).

nual Report, p. 174).[14] While the chief clerks, whose exclusion petitioner urges, are paid at a higher rate than other of the office employees, and exercise limited authority, allocating work to employees ranging in number from one to five in their respective departments, they do not have the power to hire and fire, or recommend hiring and firing, and a substantial portion of their duties is clerical (R. 545; 18, 220–221, 411–416). That the "chief clerks" stand on the same level as the other office employees is indicated by the fact that they, like the other office employees, take orders, request leave, and receive their pay from the same supervisory employee (R. 16, 18, 106, 113, 129, 163).

Petitioner's reliance (Pet. 43–44) upon the decision of the Third Circuit Court of Appeals in *National Labor Relations Board* v. *Delaware-New Jersey Ferry Co.*, 128 F. (2d) 130, as support for its contention, is misplaced. In the *Delaware-New Jersey* case, as the court stressed in its decision (pp. 136–137), licensed officers were excluded from a unit of ship personnel because of the sharp cleavage between licensed officers and the employees who must obey their orders or be found guilty of mutiny under maritime law. Cf. *Southern Steamship Corp.* v. *National Labor Relations*

[14] See also *Fourth Annual Report*, p. 82; *Fifth Annual Report*, pp. 63–64; *Sixth Annual Report*, p. 63; *Seventh Annual Report*, p. 59.

Board, 316 U. S. 31. Certainly it cannot be said that the Board's action (R. 545), upheld by the court below (R. 614), "was so unreasonable or capricious as to pass the bounds of permissible discretion," *Marlin-Rockwell Corp.* v. *National Labor Relations Board,* 116 F. (2d) 586, 587 (C. C. A. 2), and it does not present a question of importance calling for review by this Court.

Petitioner's further contention (Pet. 43) that the Board drew an arbitrary distinction between the chief clerks included within the unit and "four similar supervisory employees" excluded from the unit, is without foundation in the record. Kostecki, assistant general secretary, and Foszcz, head of the auditing department, two of the so-called "similar supervisory employees" are,[15] as contrasted with the "chief clerks," top ranking supervisors. Kostecki performs general supervisory functions with respect to all the employees in the office of the general secretary (R. 16, 18, 19, 215, 254, 255). Both petitioner and the employees regard him as a "boss" (R. 16, 19, 61, 359). Indeed, upon Kostecki's appointment as assistant general secretary, the general secretary

[15] While petitioner refers to "four similar supervisory employees" in its petition (Pet. 43), since petitioner in its brief before the court below limited its attack upon the Board's inclusion of the chief clerks to a comparison between the chief clerks and Kostecki and Foszcz, it is likewise limited in its attack upon the opinion of the court below to these two and improperly raises any other employee's status.

assembled all of the employees in his office, including the chief clerks to whose inclusion within the unit petitioner now objects, and announced that they would thereafter "take orders" from Kostecki (R. 16). Likewise, Foszcz, as head of the auditing department, passes upon leaves, absences, and tardiness of the 14 employees under his general supervision (R. 547; 20, 89, 106, 129, 191). Finally, that both Foszcz and Kostecki are allied with management and therefore stand on a different plane than do the chief clerks, is clear from their active direction of petitioner's drive among the employees to collect funds with which to perpetuate in office the then current officer holders (R. 20-21, 50, 107, 464, 169). The line drawn is in consonance with the Board's policy of including within the unit employees who, though possessing limited indicia of supervisory authority, are nevertheless allied in interest and in the character of the work performed with their fellow employees rather than with management (*Sixth Annual Report*, p. 70).[16]

[16] Petitioner's bare assertion (Pet. 43), unsupported by record references, that the Board arbitrarily drew a line between the secretary to the medical director, whom the Board included within the unit, and the secretary to the general secretary, whom the Board excluded from the unit, is without merit. This contention ignores the fundamental basis for the Board's exclusion of certain types of confidential employees. The Board excludes as confidential employees those employees who have access to confidential information dealing with labor relations (*Sixth Annual Re-*

3. UNFAIR LABOR PRACTICES

Petitioner's contention (Pet. 45–47) that the Board's findings that petitioner violated Section 8 (1) and (3) of the Act are not supported by substantial evidence presents no question of general importance. Further, the evidence summarized in the Statement (*supra*, pp. 7–11) affords full support for the challenged findings, as the court below held (R. 614).

CONCLUSION

The decision below, sustaining the Board's findings and order, is correct, and there is no conflict of decisions. Accordingly, no further review

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port, p. 70). The duties of a secretary to a medical director checking applications for insurance does not fall within this category (R. 545–546; 221, 223). On the other hand, Killoren, the secretary to the general secretary, has access to confidential information pertaining to labor relations and, in addition, is a ranking supervisory employee having charge of all the girls in the general secretary's office, numbering between 37 and 40 (R. 553; 19, 28, 29, 124–125, 163–164). Equally untenable is petitioner's assertion (Pet. 43) that the Board arbitrarily drew a distinction between two librarians and two so-called "editors." The librarians work in the basement entirely apart from the other employees in the unit found to be appropriate, performing functions peculiar to their calling (R. 546; 31, 59–60, 216–217, 255–256, 411–412) whereas the so-called "editors," classified respectively "clerk and editor" and "correspondent," are employed in the general secretary's office in the publication of the weekly *Zgoda* and a monthly youth publication (R. 546; 222–223, 416). From the standpoint of petitioner's administrative organization, the nature of the work performed, and the place of performance, they are clearly a part of the unit.

would seem to be required. If, however, the Court should regard the question of commerce as warranting the granting of the petition, the writ should be limited to that issue.

Respectfully submitted.

CHARLES FAHY,
Solicitor General.

ROBERT B. WATTS,
General Counsel,

RUTH WEYAND,
WILLIAM J. ISAACSON,
Attorneys,
National Labor Relations Board.

SEPTEMBER 1943.

APPENDIX

The pertinent provisions of the National Labor Relations Act (Act of July 5, 1937, c. 372, 49 Stat. 449, 29 U. S. C., Sec. 151, *et seq.*), are as follows:

SEC. 2. When used in this Act—

* * * * *

(6) The term "commerce" means trade, traffic, commerce, transportation, or communication among the several States, or between the District of Columbia or any Territory of the United States and any State or other Territory, or between any foreign country and any State, Territory, or the District of Columbia, or within the District of Columbia or any Territory, or between points in the same State but through any other State or any Territory or the District of Columbia or any foreign country.

(7) The term "affecting commerce" means in commerce, or burdening or obstructing commerce or the free flow of commerce, or having led or tending to lead to a labor dispute burdening or obstructing commerce or the free flow of commerce.

* * * * *

SEC. 7. Employees shall have the right to self-organization, to form, join, or assist labor organizations, to bargain collectively through representatives of their own choosing, and to engage in concerted activities,

for the purpose of collective bargaining or other mutual aid or protection.

SEC. 8. It shall be an unfair labor practice for an employer—

(1) to interfere with, restrain, or coerce employees in the exercise of the rights guaranteed in section 7.

* * * * *

(3) By discrimination in regard to hire or tenure of employment or any term or condition of employment to encourage or discourage membership in any labor organization: * * *.

* * * * *

(5) To refuse to bargain collectively with the representatives of his employees, subject to the provisions of Section 9 (a).

SEC. 9 * * *

(b) The Board shall decide in each case whether, in order to insure to employees the full benefit of their right to self-organization and to collective bargaining, and otherwise to effectuate the policies of this Act, the unit appropriate for the purposes of collective bargaining shall be the employer unit, craft unit, plant unit, or subdivision thereof.

(c) Whenever a question affecting commerce arises concerning the representation of employees, the Board may investigate such controversy and certify to the parties, in writing, the name or names of the representatives that have been designated or selected. In any such investigation, the Board shall provide for an appropriate hearing upon due notice, either in conjunction with a proceeding under section 10 or otherwise, and may take a secret ballot of

employees, or utilize any other suitable method to ascertain such representatives.

* * * * *

SEC. 10. (a) The Board is empowered, as hereinafter provided, to prevent any person from engaging in any unfair labor practice (listed in section 8) affecting commerce. This power shall be exclusive, and shall not be affected by any other means of adjustment or prevention that has been or may be established by agreement, code, law, or otherwise.

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